United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-4169

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AIRLINE CHARTER TOUR OPERATORS ASSOCIATION, ET AL.,
Intervenors.

ON PETITION FOR REVIEW OF A
REGULATION OF THE CIVIL AERONAUTICS BOARD

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COUNTERSTATEMENT OF THE ISSUE

The Civil Aeronautics Board has promulgated by rulemaking procedures a regulation which establishes a new type of charter service called "One-stop-inclusive Tour Charter." The question for review is whether the new service is a bona fide "charter" under the Federal Aviation Act.

COUNTERSTATEMENT OF THE CASE

This case arises from a petition to review a rule adopted by the Board on August 7, 1975, which authorized, on an experimental basis, a new class of charters called "One-stop-inclusive Tour Charters" (hereinafter referred to as OTC's), to be operated by United States scheduled and supplemental (charter) air carriers and foreign air carriers holding certificates or permits under the Federal Aviation Act (Act). 1/ The rule is challenged in this proceeding by Trans World Airlines (TWA), a U.S. scheduled air carrier. The member carriers of the National Air Carrier Association (NACA), a trade association of the U.S. supplemental carriers, and Evergreen International Airlines, a U.S. supplemental carrier authorized to operate within the United States and between the United States and Canada, have intervened herein in support of the Board's rule. In addition, United Air Lines, the largest U.S. scheduled carrier, has filed an amicus brief in support of the rule.

A. General background.

Several references to "charters" appear in the Federal Aviation Act. The supplemental air carriers' certificates, issued under Section 401(d)(3) of the Act, 49 U.S.C. 1371(d)(3) (infra, p. A-2), authorize them to engage only in "supplemental air transportation." This is defined in pertinent part as "charter trips * * * in air transportation" (Section 101(~~34~~ 36), 49 U.S.C. 1301(~~34~~ 36), infra, p.A-1). This same term appears in Section 401(e)(6)

1/ Regulation SPR-85 (A.1a). All "A" cites are to the appendix filed by petitioner.

of the Act (49 U.S.C. 1371(e)(6)) which authorizes the scheduled air carriers to conduct off-route "charter trips." General speaking, the term charter is equally applicable to the operations of foreign air carriers holding permits issued under Sec. 402 of the Act (49 U.S.C. 1371) which authorizes either regular route operations (see Part 212 of the Board's regulations, 14 C.F.R. 212) or "charter" only operations (see Part 214 of the Board's regulations, 14 C.F.R. 214).

"Charter" is a term denoting a fundamental distinction between group travel and individually ticketed travel of the sort normally associated with scheduled point-to-point service. It is not defined by the Act and is thus subject to refined definition and regulation by the Board to maintain the basic distinction it denotes. Pan American World Airways, et al. v. C.A.B., 517 F.2d 734 (C.A. 2, 1975); Saturn Airways v. C.A.B., 483 F.2d 1284 (C.A.D.C., 1973); Trans International Airlines v. C.A.B., 432 F.2d 607 (C.A.D.C., 1970); Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided court, 391 U.S. 461 (1968); American Airlines v. C.A.B., 365 F.2d 939 (C.A.D.C., 1966); American Airlines v. C.A.B., 348 F.2d 349 (C.A.D.C., 1965). As this Court recently said in the first of the cited cases, Congress has left it to the Board to "evolve a [charter] definition in relation to such variable factors as changing needs * * *." (517 F.2d at 737).

Charter service is inherently less expensive to individuals than conventional service because the entire capacity of an aircraft is used and the costs can be spread among more passengers than in scheduled service, where planes usually fly with less than a full planeload and the costs are borne by fewer passengers. Over the years, the predominant form of charter permitted by the Board has been the pro rata charter by affinity groups. Those are charters in which a club or organization charters an aircraft for its own use, each participant sharing equally in the cost. The Board's regulations contain numerous technical restrictions designed to insure that the participants in such charters are drawn from a bona fide club or organization existing for purposes other than travel, since in this type of charter such affinity is the tool utilized by the Board to maintain the distinction between group travel and individually ticketed service (see 14 C.F.R. 207, 208, 212, 214).

Until 1967, the affinity charter constituted the only type of charter service available to the vacation traveler interested in low-cost group transportation. 2/ In that year, however, the Board adopted rules authorizing "inclusive tour charters" (ITC's) which involve the charter

2/ The Board's rules, of course, permitted various other types of charters which serve very limited segments of the population. These include "study group charters" (14 C.F.R. 373) involving groups comprised solely of bona fide participants in a formal academic course of study abroad which is of at least four weeks duration. There are also "overseas military personnel charters" (14 C.F.R. 372) which are limited to military personnel on active duty with the U.S. armed forces and stationed outside the 48 contiguous states and their immediate families, and which involve transportation between a place in the 48 contiguous states and a military installation outside thereof. The Board also permits "single-entity" charters which involve engagement of an aircraft by one person for the transportation of others who pay nothing. A typical example would be the charter of an air craft by an industrial concern to transport a group of its employees.

of an aircraft by an entrepreneur who then offers the seats to the general public as part of a one-price package which includes accommodations and other ground arrangements. The ITC rule provides that the tour package include stops in a minimum of three cities and requires that it be sold for a minimum price which must exceed the lowest available scheduled air fare for the tour itinerary (see 14 C.F.R. 378).

Those two charter services, however, did not provide an adequate or appropriate means to meet the growing demand for low-cost charter air transportation. Affinity charters, the most widely used type of charter, have "proven to be discriminatory in application and difficult in enforcement." Saturn Airways, Inc. v. C.A.B., 483 F.2d 1284, 1292 (C.A.D.C., 1973). As this Court recently noted:

> "Affinity charters * * * tend to discriminate against members of the public who do not belong to qualified organizations with a membership large enough to successfully mount a charter program. Additionally, wide abuses of the affinity rules developed over the years; spurious organizations were formed, composed of individuals, otherwise unrelated to one another, who were brought together essentially at the time of flight, solely to pretend to conform to the rules under which low cost transportation was made available. See C.A.B. v. Carefree Travel, Inc., 513 F.2d 375 (2d Cir., 1975). The charter rules lacked common acceptance among passengers because it was not clear to them why the test for eligibility for low cost transportation was membership in a group which had nothing to do with transportation." Pan American World Airways v. C.A.B., 517 F.2d 734, 737 (1975).

As to ITC's, the only other type of charter which was then lawfully available to the vacation traveler, the three-stop and minimum price requirements which the Board's rules prescribe for the ITC tour package severely limited its popularity and rendered the service unfeasible to most passengers. 3/

Recognizing the need for more effective and equitable charter rules, the Board in 1972 authorized the performance of travel group charters (TGC's), a charter service based upon eligibility requirements other than organization membership. The TGC rule provides that a charter may be formed from a group of 40 or more persons for round trip transportation for a trip lasting at least seven days in North America and at least ten days elsewhere in the world. The rule requires, among other things, that all charter participants must sign-up and pay for the trip 90 days in advance of the departure date and that all participants bear a pro rata share of the charter costs and thereby assume a risk of increased costs resulting from defaults by individual participants (see 14 C.F.R. 372a). 4/

Despite the optimistic hopes for the TGC rule, the new charter concept has not provided a viable alternative to the "prior affinity" rule or satisfied the increasing demand for low-cost charter travel. The inability

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3/ Since its inception in 1967, ITC's have accounted for less than 10 percent of all charter flights. U.S. International Passenger Movements on Charter Flights, 1968-73, (rev. ed. 1974), p. 20; SPR-85, App. 3 (A.86a).

4/ The TGC rule was upheld by the District of Columbia Circuit in Saturn Airways, Inc. v. C.A.B., 483 F.2d 1284, 1292 (C.A.D.C. 1973). The provisions of the rule are discussed in detail therein.

to know the precise cost of the TGC until the time of flight departure and the lengthy 90-day advance purchase requirement created severe marketing problems and rendered the service unfeasible to most potential charter passengers. As a consequence, between its adoption in 1972 through 1974, TGC's accounted for only one percent of the total charter traffic and, nearly 85% of the proposed TGC charters filed with the Board were ultimately cancelled. Moreover, the TGC rule did not provide an alternative for those persons interested in an all-inclusive vacation package but who could not accommodate their travel plans to the three-stop restriction attached to the ITC rule. 5/

As a result of the failure of TGC's to achieve its objectives and the continued need for workable, nondiscriminatory and enforceable charter rules, the Board instituted the proceeding which culminated in the promulgation of the OTC regulations here challenged. Before discussing the proceedings, we turn first to an outline of the rules themselves.

5/ In August, 1974, the Board eased some of the original TGC restrictions (i.e. the reduction in the advance purchase requirement from 90 to 60 days). See, e.g., Board Regulation SPR-78. However, these minor changes did not permit any significant increase in the availability or use of TGC's.

Also in 1974, the Board amended the TGC rules to permit the performance of foreign-originating TGC's (TGC/ABC's) organized in conformance with the rules of the country of origin and which meet certain specified requirements. As discussed infra, the TGC/ABC amendment was affirmed by this Court in Pan American World Airways, et al. v. C.A.B., 517 F.2d 734 (1975). While the TGC/ABC amendment is more liberal than the original TGC rule in some respects, it is only applicable to charters originating in foreign countries.

B. One-stop inclusive tour charters. 6/

The OTC is intended as "a hybrid between the TGC rule and the ITC rule, designed primarily for persons interested in an all-inclusive vacation package at a single destination." (SPDR-38, p. 4). The OTC rule provides for a tour package consisting of round trip air transportation and hotel accommodations for each night of the tour and ground transportation from the airport to the hotel and between destination points on the tour (§§378a.2, 378a.10(a), A. 42a, 46a). The tour is arranged and sold by a "tour operator" as an independent principal with respect to the air transportation included in the tour and not as an agent for a direct air carrier (§378a.10(a), A.46a). The cost of the tour package can be no less than the charter price of the participant's seat (i.e., the charter price specified in the charter contract), plus $15 for each night of the tour for the ground accommodations and services (§378a.10 (g)(1), A.47a).

The OTC charter contract must be for 40 or more seats (§378a.10(b), A.46a). There can be no intermingling of passengers from different groups and no one way passengers (§378a.12, A.48a). Rather, all passengers travel and return together as a group on both legs of the flight, and on all ground transfers between airports and hotels, and between destination points on the tour (ibid). The minimum duration for a North American tour is 4 days, and 7 days for all other tours (§378a.10(d), A.46a).

6/ The OTC rule is set out in its entirety in petitioner's appendix at A.39a-70a.

No later than 15 days prior to the scheduled date of departure, in the case of North American OTC's, and no later than 30 days prior to the scheduled date of departure for all other tours, the tour operator is required to file with the Board a list of all tour participants (§378a.25(b), A.52a). Each participant, in turn, must enter into a binding contract with the tour operator and make full payment of the total price of the charter tour prior to the time such list is filed (ibid). The passengers transported on the charter flight must consist solely of persons whose names are included on the list, and no additions or substitutions of names are permitted after filing (§378a.10(f), A.47a).

The tour operator is permitted to impose cancellation penalties in the event a participant is unable to depart as planned (§378a.30, A.55a). The penalty may equal the entire tour price (ibid).

C. The OTC rulemaking proceedings.

The Board instituted a public rulemaking proceeding on October 30, 1974, to consider the establishment of OTC's. 7/ In its notice of proposed rulemaking, the Board stated that it was motivated by the following principal factors: (1) the failure of the TGC rule to achieve its objectives; (2) the continuing need to supplant the affinity rules with workable, non-discriminatory and enforceable alternatives; and (3) the need to provide a

7/ The proceeding was instituted by Notice of Proposed Rulemaking SPDR-38. Subsequently, on April 21, 1975, the Board issued Supplemental Notice of Rulemaking SPDR-37C which modified the proposed rule in certain respects.

reasonable outlet for the ever-increasing demand for low-cost charter services (SPDR-38, pp. 4-7).

In proposing the OTC rule, the Board expressed the "tentative view" that:

> "OTC's will not have an adverse impact upon scheduled carriers nor be unduly diversionary of scheduled service. Scheduled carriers will be authorized to perform OTC's and will therefore have ample opportunity to share in the development of this type of charter. The * * * various proposed restrictions will insure their use primarily by the economy-minded vacation traveler. It is our tentative view, therefore, that our proposal herein, together with our other existing and proposed charter regulations, will not only provide a workable economical alternative to the affinity rules, but will also generate new passengers from among those people who have not been eligible to participate in affinity charters, and who would not, or could not, travel except on economical all-inclusive tours." (SPDR-38, p. 5).

The Board tentatively felt, moreover, that the proposed OTC restrictions would maintain "the legally required distinction between individually ticketed service and charter service." (Ibid).

In response to the proposed OTC rule, approximately 100 parties submitted comments totalling over 5,000 pages. 8/ The vast majority of comments, including those received from the supplemental air carriers, four Departments of the Federal Government (Justice, Commerce, Transportation and Health, Education and Welfare), local communities, travel agency

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8/ The parties filing comments are listed in the Appendix at A.71a-80a.

representatives and consumer groups, strongly supported the adoption of the OTC charter regulations. In sum, those parties asserted that the proposed limitations and restrictions on OTC's satisfy the legal requirements under the Federal Aviation Act that charter services be separate and distinct from individually ticketed services; that OTC charters would not cause significant diversion from the scheduled services; and that the new charter operations would generate substantial new traffic and have a stimulative effect on the entire air transportation industry. Many of the parties, moreover, contended that some of the OTC requirements were too restrictive (i.e., the 30-day advance purchase/filing requirement) and could be reduced or eliminated without changing the nature of the service.

Several U.S. scheduled carriers, including United Air Lines (the world's largest scheduled carrier) and Pan American World Airways, similarly supported the OTC charter concept and rejected the notion that the proposed rule would threaten their scheduled services. TWA, on the other hand, advocated that the restrictions on OTC travel "be tightened" to avoid risk of undue diversion. Even that carrier, however, did not make a serious attempt to argue that the proposed restrictions were inadequate to distinguish OTC's from individually ticketed service.

D. The Board's decision.

On August 7, 1975, upon consideration of the filed comments, the Board adopted the OTC rule as proposed in the notice and supplemental notice of rulemaking. The Board concluded that the "restrictions which we have chosen to apply to OTC's adequately distinguish these charters from * * * individually ticketed service." (SPR-85, p. 12, A.12a). In particular, the Board pointed to the following set of restrictions which are not a part of individually ticketed service (ibid):

> "(1) OTC participants are limited to specific dates and times for both the departure and return. They must commit themselves to specific departure and return flights in advance of departure. The participant's ability to change plans, to cancel, or to obtain a refund will be subject to whatever additional terms the tour operator chooses to apply * * *.
>
> "(2) All participants must go and return together as a group on both legs of the flight, and on all ground transfers between airports and hotels, and between destination points on the tour. There can be no intermingling of passengers from different groups, and no one-way passengers. Concomitantly, if the OTC participant uses the outbound flight there need not be a refund of that portion of the tour price attributable to the cost of the return flight, whatever prevents the participant from returning as planned.
>
> "(3) OTC participants are subject to the pre-determined fixed restrictions on the tour length established by the tour operator, and these may in no event be less than prescribed minimums. The minimum duration for North American tours is 4 days, and for all other tours 7 days.
>
> "(4) OTC participants must purchase, as part of the OTC price, specific accommodations and specific ground services selected by the tour operator."

Turning to the justification for the OTC rule, the Board concluded that there was a definite "need" for the new service (Id. p. 9, A.9a). It found that the reasons which prompted the proposal of the OTC rule, the "need to find effective non-discriminatory alternatives to the affinity rules and to provide a reasonable outlet for the ever-increasing demand for low cost charter services," warranted its adoption (Ibid). The Board noted, moreover, that the costs of air transportation had risen substantially in the past two years due to higher fuel costs and inflationary pressures, and as a result a larger percentage of the population was now priced out of the market for scheduled services (Id. pp. 9-10, A.9a-10a). As a consequence, the Board concluded, there was now an even greater necessity to make available non-discriminatory low cost charter operations (Ibid.)

With regard to the question of diversion, the Board concluded "that the extent of diversion from scheduled services will be far too low to unduly impair either those services or the health of the airlines that provide them" (Id. p. 5, A.5a). In doing so, the Board pointed to several reasons for its conclusion:

> 1. The OTC rule contains numerous restrictions that will have the practical effect of precluding the use of OTC's by most passengers presently using scheduled service. The OTC restrictions require travel plans to be made considerably in advance, and will thereby prevent the use of OTC's by passengers who for any reason cannot be certain of their vacation plans or who cannot accommodate themselves to the decision of OTC operators in respect to departure date, length of stay, and return date (Id. p. 6, A.6a).

2. Although the same claims of diversion were advanced when the Board proposed to adopt the TGC rule, the ITC rule, and other types of charters, significant diversion has never in fact resulted after the introduction of any new charter service (Id. p. 5, 5a).

3. Charter traffic constitutes only a small part of the traffic in the U.S. air transportation system, and there is no rational basis to suppose that it will forthwith expand to levels that spell disaster (Ibid).

4. Scheduled carriers have historically outcarried the supplementals in respect to charter traffic, and there is no reason why that pattern should change for OTC operations, particularly since the supplemental's capacity is so limited compared to the scheduled carriers (Id. p. 5, App. 5-6, A.5a, 90a-96a).

5. A number of scheduled carriers favor adoption of an OTC rule and reject the notion that their scheduled operations would be jeopardized (Id. p. 5, A.5a).

6. If scheduled service to any point is going to be adversely affected by OTC's, it is service to vacation destinations as Miami, Las Vegas and Puerto Rico. Yet the civic interests representing those vacation destinations and some of the carriers offering scheduled service thereto are convinced that OTC's will have a beneficial impact and, accordingly, urge the adoption of a liberal OTC rule (Id. p. 6, A.6a).

7. The impact of OTC's on scheduled operations will be minimal if perceptible at all in a number of international markets by reason of the fact that

> some foreign governments authorize only limited charter operations or entirely preclude them (Ibid). 9/

Lastly, the Board emphasized that should OTC's, despite all the foregoing considerations, begin to threaten scheduled service in some markets or the health of some segment of the scheduled air carrier industry, "the Board will have ample power to remedy the problem." (Id. p. 7, A.7a):

> "Indeed, it is for this reason we have adopted the rule on an experimental basis. Moreover, as an additional precautionary measure we have provided for post hoc procedures for control of OTC operations in individual markets should our initial judgment in this matter prove erroneous. * * * And finally, we of course retain the ability to terminate the OTC experiment outright, and are prepared to do so should untoward consequences develop." (Ibid). 10/

9/ In that regard, the Board noted that Bermuda, Denmark, Norway, Sweden, and Israel accept no inclusive tour charters; that several European countries exercise "capacity surveillance" and "price surveillance" over inclusive tour charters; and that other countries such as Australia, Brazil, Iceland, and Japan, impose quotas or partial bans on charters generally (Ibid).

10/ As mentioned in the above-quoted passage, the Board provided for post hoc procedures for control of OTC operations in individual markets. Those procedures which are set forth in Section 378a.5 of the OTC regulations (A.44a), provide that the Board may, upon petition filed by any carrier or upon its own initiative, issue an order directing all interested persons to show cause why the Board should not impose limitations on the number of OTC's that may be operated in specific markets, or impose other restrictions as required. Thereafter, comments may be submitted in support of or opposition to the show-cause order. Upon consideration of the comments, the Board may issue a final order "imposing such

(Footnote continued)

Accordingly, the Board amended its regulations to provide that the OTC rule be made effective on September 13, 1975, and OTC charters are now being operated pursuant to that amendment. 10a/

ARGUMENT

The Board correctly interpreted the term "charter trips * * * in air transportation" as including "one-stop inclusive tour charters."

The sole issue presented by this case is whether OTC's comport with the concept of charter embodied in the Federal Aviation Act. One year ago,

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Footnote continued--

limitations or restrictions on the operations of OTC's as the public interest may require, or, if it would not be in the public interest to impose any limitation or restriction, terminating the proceeding * * *."

The Board also noted that it could readily control the affects of OTC's through amendment of Part 207 of the Board's Economic Regulations (14 C.F.R. 207), regulations which prescribe the conditions and limitations under which scheduled and supplemental carriers are authorized to perform charter operations (A.7a).

10a/ In the months following the effective date of the OTC rule, several carriers and tour organizers have jointly filed programs for proposed OTC flights in accordance with the subject regulations. An examination of these filings clearly demonstrates that the scheduled carriers are heavily involved in OTC operations. See Appendix C, infra, p. C-1. As of December 3, 1975, out of 6,181 round-trip OTC's filed with the Board and accepted for filing, 3,812 or 62 percent are being operated by U.S. scheduled carriers.

An examination also shows that TWA has been quite active in OTC operations and ranks fourth among all carriers in the number of OTC flights on file with the Board. Moreover, while opposing OTC's in the courts, TWA has not been deterred from mounting a major advertising campaign on behalf of the OTC programs utilizing TWA. See Travel Weekly, January 29, 1976, Appendix D, infra, p. D-1.

There is no indication from the first few months of operations that OTC's will have any adverse impact whatsoever on scheduled services. As noted, under 7,000 proposed OTC flights were filed with the Board through the end of the year, and some of those flights will undoubtedly be cancelled prior to departure.

in Pan American World Airways v. C.A.B., 517 F.2d 734 (1975), this Court made a definitive examination of the term "charter trips * * * in air transportation" as used in Section 101(~~34~~ 36) of the Act. 11/ There, the Court recognized that "[t]he term 'charter' is not defined by the Act," nor does it have a "fixed meaning." 517 F.2d at 736. On the contrary, it is a broad and flexible concept denoting a distinction between group travel and "individually ticketed travel of the sort normally associated with scheduled point-to-point service" (517 F.2d at 736); and so long as this distinction is not breached, the Board may lawfully "evolve a [charter] definition in relation to such variable factors as changing needs * * *." (517 F.2d at 737).

We show below that OTC's do not breach the distinction between group and individually ticketed travel. First, however, we believe it will be helpful to discuss briefly the nature of the requisite distinction.

A. The basic distinction between charter and individually ticketed service requires merely that the charter service must differ in significant respects from conventional scheduled service.

The term "charter trip" has been in the statute since its enactment as the Civil Aeronautics Act of 1938. Thus, as previously indicated, Section 401(e)(6) and its predecessor authorized the scheduled carriers to perform off-route "charter trips and special services." Prior to 1962, however, the Act contained no definition of supplemental air transportation

11/ In Pan American, this Court affirmed the Board's TGC/ABC rules (see note 5 page 7, supra).

and no specific provision for Board authorization of carriers to perform it. As early as 1955, however, the Board found, as a congressional committee later described it, that the public interest required authorization of carriers "to perform supplemental air transportation of a kind and character which does amount to a conventional, frequent, route-type service as provided by the major airlines." S.Rep't No. 1967, 86th Cong., 2d Sess., p. 5 (1960) (emphasis added).[12/] On the basis of this determination, the Board authorized a number of carriers (thereafter to be called "supplemental air carriers") to perform charter service.[13/] In addition it authorized regular scheduled service by those carriers, subject, however, to numerical restrictions on the number of flights per month between any two points.

The Board originally authorized these operations by an exemption order under Section 416 of the Act (49 U.S.C. 1386). On review, the D.C. Circuit reversed, holding that the Board's findings were inadequate to support an exemption. American Airlines v. C.A.B., 235 F.2d 845 (C.A.D.C., 1956). For present purposes, it is sufficient to take note of the Court's

12/ The Board's decision came in the Large Irregular Air Carrier Investigation, 22 C.A.B. 383 (1955).

13/ This the Board defined in pertinent part as "air transportation performed ... where the entire capacity of one or more aircraft has been engaged for the movement of persons ... on a time, mileage, or trip basis ... by a person (no part of whose business is the formation of groups ... or the solicitation or sale of transportation service) for the transportation of a group of persons ... as agent or representative of such group ...." The Board excluded from its definition of charter "services ... offered by a carrier to individual members of the general public, or ... performed ... under an arrangement with a person ... who provides or offers to provide transportation to the general public ...." 22 C.A.B. at 884-885.

observation that, by reason of the authorization to provide scheduled service, the supplementals "are moved much closer to the certificated services," i.e., the conventional services of the route-type carriers such as the trunklines.

A stay of the Court's mandate permitted the operations authorized by the exemption to continue pending Board determination of the question whether they should be certificated under Section 401. This the Board answered in the affirmative in 1959 (Large Irregular Air Carrier Investigation, 28 C.A.B. 487 (1959)), but the D.C. Circuit again reversed, holding that the statute forbade authorization of scheduled service subject to quantitative limitations. United Air Lines v. C.A.B., 278 F.2d 446 (C.A.D.C., 1960).

It was thus that Congress took the "supplemental-air-carrier problem" in hand in 1962. 14/ This ultimately culminated, as shown above, in amendment of the Act so as to define supplemental air transportation as "charter trips in air transportation" and to empower the Board to issue certificates of public convenience and necessity authorizing such transportation.

As all agree, "[t]his legislation reflected a decision by Congress that the supplementals should not be permitted to perform 'individually

14/ As a first step, stop-gap legislation was enacted mantaining the status quo until Congress could study the matter in depth and pass permanent legislation. Act of July 14, 1960, 74 Stat. 527.

ticketed' service." Pan American, supra, 517 F.2d at 741.[15] The full significance of that determination, however, is elucidated by the context in which it was made. As this Court described it,

> "[s]upplemental air carriers were at that time performing regularly scheduled service which, but for quantitative restrictions, was identical to conventional scheduled service. There were no requirements that participants be contractually bound to pay for a specific flight well in advance of the flight departure or that advance deposits be paid. Nor were there any mandatory round-trip or minimum stay restrictions much less requirements that passengers travel as part of a specific group. As matters then stood, an individual desiring to go from A to B could consult the published schedules of one or more supplementals operating between A and B, as well as those of regularly scheduled airlines serving the same points, choose the carrier and flight he pleased, pay the fare, and fly the same day." Pan American, supra, 517 F.2d at 741.

This was the "individually-ticketed service" the supplementals were providing when Congress determined that they should no longer provide it.[16]

Although "foreclosing further individually ticketed service by the supplementals, Congress agreed with the Board that these carriers have an important place in the air transportation system." Pan American, supra,

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15/ Provision was made for special authorizations to engage in individually ticketed service in certain limited circumstances. See Section 417, 49 U.S.C. 1387.

16/ Moreover, as the District of Columbia Circuit documented at length in American Airlines, supra, 365 F.2d 939, some supplementals had utilized their individually ticketed authority in a manner which circumvented the quantitative restrictions, a practice which Congress intended to put to an end.

517 F.2d at 741. Their role, it said, was to provide charters. This term it elected not to define, leaving it, as previously indicated, to the Board to "evolve a definition in relation to * * * changing needs * * *." Pan American, supra, 517 F.2d at 741. It did not, however, leave the Board without guidance. The Board was not to permit individually ticketed service in the guise of a charter. To this end Congress decreed that, whatever definition the Board evolved, a charter must be a "different sort of service from individually ticketed transportation." S. Rep't No. 688, 87th Cong., 2d Sess., p. 14 (1961).

What emerges from this is perfectly clear. The supplementals were at that time performing services several of which were qualitatively the same as the every day services of the trunklines. This was to cease and, to insure against evasion of the congressional intent that it cease, any definition of charter evolved by the Board must contain elements which make the charter a "different sort of service" from what they had been providing under their individually ticketed authority. Thus, "the touchstone [of the distinction between the two] is simply that charter service must be 'of a kind and character which does not amount to conventional * * * service as provided by the major airlines' S. Rep't No. 1567, 86th Cong., 2d Sess., 5 (1960)." Pan American, supra, 517 F.2d at 741.

B. Under the regulations adopted by the Board, OTC service is different in significant respects from conventional scheduled service.

As explained in the counterstatement, the Board's OTC rules establish an elaborate set of restrictions designed to insure that OTC's are significantly different from the conventional service available to the individual traveler. On their face, we submit, they demonstrate a substantial and profound difference between OTC travel and conventional travel. These distinctions include the following:

1. All OTC participants travel and return together as a group on both legs of the flight. There can be no intermingling of passengers from different groups and no one-way passengers. Moreover, OTC participants are subject to predetermined fixed restrictions on the length of their trips. Conversely, as this Court recognized in Pan American, such restrictions are not associated with individually ticketed service:

> "In sharp contrast, no restrictions need be placed on an individually-ticketed traveler. Such passager has a choice between purchasing a one-way or round trip ticket. He need not be 'locked' into any specified length of stay or date of return. The individually ticketed passenger can cut short his trip, extend it, make up his mind when to return after he reaches his destination, or decide not to return at all." Pan American, supra, 517 F.2d at 742.

2. Other restrictions severely limit passenger flexibility on the ground. All OTC participants must purchase, as part of the OTC price, specific accommodations and ground services selected by the tour

operator. 17/ The participants stay at the same pre-selected hotels and travel as a group on all ground transfers between airports and hotels, and between destination points on the tour itinerary. Individually ticketed passengers, on the other hand, are obviously not required to purchase land accommodations in addition to air transportation or stay at any particular hotel. And they are free to plan and rearrange their itineraries as they see fit.

3. At least 30 days in advance of international flight departures and 15 days prior to domestic departures, OTC participants must contract and pay for a specifically identified flight. In contrast, an individually ticketed traveler need not incur any contractual obligation prior to the flight or make any advance payments. He need simply consult the published schedules of the scheduled carriers, choose the carrier and flight he pleases, pay the fare, and fly the same day. He may also change his reservation to another flight at any time and cancel when he pleases.

Despite those distinctions, TWA argues that the court decisions affirming the TGC and TGC/ABC rules support the notion that the OTC restrictions are not sufficient to distinguish OTC's from individually ticketed services. Essentially, it contends that many of the restrictions

17/ To insure that the "ground accommodations" portion of the OTC tour package would not be a sham, the OTC rules provide that the price for the accommodations can be no less than $15 per night. Moreover, most of the OTC tour contracts filed with the Board thus far provide accommodations at prices well above the $15 minimum.

expressly noted by this Court (in Pan American) and the District of Columbia Circuit (in Saturn Airways) to distinguish TGC's and TGC/ABC's from individually ticketed service have been eliminated by the Board in its OTC regulation (Br. 14-19).[18/] TWA apparently feels that those requirements were indispensible to maintain the requisite distinction.

In affirming the TGC and TGC/ABC regulations, however, neither this Court nor the District of Columbia Circuit held that each of the restrictions specifically noted were necessary to distinguish charters from individually ticketed services. Rather, as was emphasized in Pan American (517 F.2d at 742), "the court's focus was upon the cumulative effect of the entire set of restrictions, and the court simply listed certain factors and restrictions which contributed to its ultimate determination."

18/ In Pan American, this Court specifically noted the following differences between TGC/ABC's and conventional travel:

> "(1) At least 90 days in advance of flight departure, TGC/ABC participants are contractually bound to pay for a specifically identified flight * * *. (2) * * *. All TGC/ABC participants must go and return together as a group. There can be no intermingling of passengers from different groups and no one-way passengers. Moreover, TGC/ABC participants are subject to predetermined fixed restrictions on the length of their trips * * * (3) The TGC/ABC restrictions necessitate a significant risk of flight cancellations up to the date of departure * * *. [W]hile the TGC/ABC rules do not mandate flight cancellation under specified circumstances, neither do they forbid contractual provisions authorizing cancellations. 517 F.2d at 742.

Moreover, TWA's argument ignores that the most fundamental restriction placed on OTC's -- the requirement that it involve the purchase of an all-inclusive tour package -- is not imposed on TGC's or TGC/ABC's. Thus, neither TGC's nor TGC/ABC's require the purchase of specific hotel accommodations or involve other ground restrictions. Furthermore, TWA's assertions to the contrary, nearly all the restrictions specifically noted by this Court to maintain the distinctions between TGC/ABC's and individually ticketed service (see note 18, supra) are present in the OTC rule. 19/

19/ Thus, as with TGC/ABC's, the OTC rule requires that all participants go and return together as a group, that there be no intermingling of passengers and no one-way passengers, that participants be limited to a specified length of stay and departure and return date, and that participants contract and pay for the tour package a significant period in advance of the tour departure. Both services also permit the tour operator to impose penalty provisions on cancelling participants.

TWA's attempts to portray the OTC rule as less restrictive than TGC/ABC's are unpersuasive. First, it argues that while TGC/ABC participants must be contractually bound to pay for a specifically identified flight a significant period in advance of departure, the OTC rule "contains no requirement that participants be contractually bound" in such manner. (Br. 18). To the contrary, however, the OTC rule provides that prior to the time the tour operator files a passenger list with the Board (no later than 30 days prior to the scheduled date of departure for international OTC's and 15 days for North American OTC's) the OTC participant must enter into a binding contract and make full payment of the total price of the charter tour (§§378a.25(b) and 378a.30, A.52a, 54a). While TWA notes that the OTC rule permits the tour operator to impose penalty provisions on cancelling participants but does not require him to do so, the same is true under the TGC/ABC rule. It is interesting to note, moreover, that while the OTC rule requires full payment of the charter tour prior to the time the passenger list is filed with the Board, the TGC/ABC rule imposes no advance payment requirements.

(Footnote continued)

In sum, the OTC restrictions must be viewed on the basis of their "cumulative effect." When this is done, it is, we submit, impossible to say that OTC service is not fundamentally different from conventional scheduled service.

C. The legislative history of the inclusive tour charter legislation does not support the contentions of illegality.

In 1968, Congress amended Section 101(~~34~~ 36)(49 U.S.C. 1301(~~34~~ 36)) of the Act to specifically include in the definition of "supplemental air transportation" inclusive tour charter trips. 20/ TWA contends that (1)

Footnote continued--

TWA next argues that the OTC rule permits the transport of OTC groups on the same aircraft with other charter traffic (Br. 18). It ignores, however, that the Board's rules also permit the transportation of TGC's, prorated TGC/ABC's and other types of charters on the same aircraft with other charter traffic (see 14 C.F.R. 207.11(c)). Moreover, the OTC rule specifically provides that there "shall be no intermingling of passengers and each planeload group, or less-than-planeload group shall move together as a group * * *." (A. 48a). Thus, OTC groups are transported on all-charter flights and stay together on both legs of the journey and on the ground.

Finally, TWA also states that "the OTC restrictions do not necessitate a significant risk of flight cancellations * * *." (Br. 18). To the contrary, however, each OTC contract must cover at least 40 seats and generally will involve a substantially greater number. Should the charter offering not attract a sufficient number of passengers, the offering may be cancelled (§378.10(b)). And even after a sufficient number of participants are obtained and the passenger list is filed with the Board, the tour operator may cancel the tour for reasons other than inadequate participation (§378.10(b)).

20/ Public Law 90-514 amended Section 101(34) of the Act in relevant part to read as follows: "'Supplemental air transportation' means charter trips, including inclusive tour charter trips in air transportation * * *."

that amendment constituted a recognition by Congress that the 1962 legislation authorizing "charter trips" was not intended to embrace inclusive tour charter trips, and (2) that the 1968 amendment was intended to authorize and limit tour-type charters to three-stop tours as provided in the Board's ITC rules. The argument follows that since OTC's involve a "one-stop" inclusive tour package, they are not permitted under the charter legislation. (Br. 4-11). As shown below, however, TWA's contentions are controverted by the legislative history and background of the 1968 amendment.

The amendment arose out of the Board's determination in 1966 to authorize the supplementals to perform ITC's. Supplemental Air Service Proceeding, Order E-23350 (March 11, 1966). As discussed supra, the Board's ITC rule involves a tour package which includes stops in a minimum of three cities. In promulgating the rule, the Board concluded that ITC's were charters within the meaning of that term in the 1962 legislation. Using the test previously described, the Board said:

> "The use of the charter mechanism, combined with the restrictions which we are imposing by regulation, necessarily results in a service to the public which is different in significant respects from that available on scheduled services" (Order E-23350, Mimeo, p. 11, emphasis added).

Shortly thereafter, several scheduled carriers challenged the lawfulness of the ITC rule in the District of Columbia Circuit. Essentially, they argued that the 1962 supplemental legislation prohibits charters from being solicited from the general public. In support of the contention, the

carriers noted that during the floor debate leading to enactment of the supplemental legislation, certain members of Congress expressed the view that the legislation would exclude from the charter concept any arrangement (including all-expense tour packages) under which one could charter an aircraft from a supplemental and thereafter solicit the general public to buy the space. As ITC's involve solicitation from the general public, it was asserted to be outside the concept of charter under the Act.

Rejecting the arguments of the scheduled carriers, the District of Columbia Circuit upheld the ITC rule. American Airlines, Inc. v. C.A.B., 365 F.2d 939, 943-45 (C.A.D.C., 1966). In so holding, the Court concluded that notwithstanding the individual statements of various members of Congress to the contrary, all-expense tours assembled from the general public were not inconsistent with the term "charter" in the 1962 supplemental air carrier legislation; that the restrictions did result in a kind of service different from conventional airline service; and hence that ITC's "[comport] with the overall statutory intention of Congress" (365 F.2d at 948).

A year later this Court reached the opposite conclusion, relying primarily on the statements which had failed to sway the District of Columbia Circuit. Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided Court sub nom. World Airways v. Pan American World Airways, 391 U.S. 461 (1968). When the equal division

of the Supreme Court failed to resolve the conflict, [21/] Congress promptly took the matter in hand by amending the definition of "supplemental air transportation" to include "inclusive tour charters." In doing so, it stressed that the Board's power "is clarified, not enlarged." [22/] Thus, in effect concurring with the decision in American Airlines, supra, 365 F.2d 939, Congress determined that the 1962 supplemental air carrier legislation permitted all-expense tours assembled from the general public and that the Board had had the statutory power to authorize ITC's all along. [23/] As this

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21/ An affirmance by an equally divided Supreme Court is not "entitled to precedential weight." Neil v. Biggers, 409 U.S. 188, 192 (1972).

22/ See S. Rep't No. 1354, 90th Cong., 2d Sess., 2 (1968): "S.3566 would clarify Congress' intent," and 8: "The bill would reaffirm the previous position taken by this committee that inclusive tour charter trips are in the public interest and that supplemental air carriers should have the authority to conduct them." See also H. Rep't No. 1639, 90th Cong., 2d Sess., 2 (1968): "The bill would amend the Federal Aviation Act of 1958 ... to clarify Congress' intent that inclusive tour charter trips do not permit individually ticketed service by supplemental air carriers ...." and 4: "The CAB's authority is clarified, not enlarged here." These excerpts from the Senate and House Committee reports were noted in Saturn Airways, supra, 483 F.2d at 1291.

23/ Several aspects of the legislative history of the 1968 amendment are of more than passing interest in this respect. Senator Monroney, the Senate manager, made it clear that the 1962 statements of his colleagues and their opposite numbers in the House did not reflect the intent of Congress: "I would be less than fair if I didn't say ... having been chairman of the conference committee ..., that contrary to the statements of the Members of the House at the time the bill was passed and some of our own colleagues, supplementals were not prohibited from the business of all inclusive tours .... The bill was intended to give the CAB authority to decide that." Senate Hearings on S.3566, supra, p.78. Senator Cannon associated himself with these comments, adding that his colleagues "were not speaking for me" and that "all we did was to leave that question open for the Board to decide ...." (id., at p. 86).

(Footnote continued)

Court stated last year upon examination of the legislative history of the 1968 amendment:

> "It was the judgment of Congress, therefore, that the Board has always had the statutory power to authorize ITC's. Congress concluded that public solicitation was not inconsistent with the term 'charter' in the definition of supplemental air transportation so long as the service was different in significant respects from conventional airline service." Pan American, supra, 517 F.2d at 743.

In sum, the purpose of the 1968 amendment was simply to clarify the Board's existing authority to reasonably define the term "charter." It did not suggest an intent to proscribe a charter definition or to limit tour type charters to the terms of the ITC rule. 24/ Thus, the Board remains

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Footnote continued--

Also of note are Senator Monroney's comments regarding the scheduled carriers' assertions that ITC's involve individually-ticketed service: "I must ... disagree that this bill has anything to do with individually-ticketed traffic. This is an assumption which seems to be part of a creed that your scheduled airlines have adopted." (id., at p. 90); "This has nothing to do with individual ticketing .... It is a lot different from walking down with your checkbook in hand, or your credit card, and saying: 'Give me a trip to Stockholm'" (id., at 95).

24/ Indeed, as the House Report specifically noted:

> "We think that shifting economic conditions and the public convenience and necessity may require modifications in the regulations. We do not undertake here to prescribe the usual rulemaking procedures of the CAB, and will leave the Board with its present flexibility, which must be exercised within the confines of the statute, due process, and full participation on the part of interested parties in the Board's rulemaking proceedings." H. Rep't No. 1639, 90th Cong., 2d Sess. (1968).

free to "evolve a definition in relation to * * * changing needs" (Pan American, supra, 517 F.2d at 737) subject only to the requirements that it involve group travel which differs in significant respect from conventional scheduled service. And, as we have shown, the OTC participants are subject to a complex set of restrictions which maintain the necessary distinction.

D. The OTC service will "supplement" scheduled service within the meaning of the Act.

TWA contends (Br. 12-14) that OTC's are not "supplemental air transportation." The only reason given is that OTC's "authorize the supplemental carriers to enter the 'low-cost bulk transportation' market" in direct competition with the scheduled carriers.

The short answer is that the statute does not preclude supplemental carriers from competing with scheduled carriers for passengers interested in "bulk" transportation.[25/] [redacted] Court stated in the Pan American case,

> "There is * * * nothing in the statute which precludes competition between the supplementals and the scheduled airlines or which relegates the supplementals to types of service or traffic which the scheduled carriers are unwilling or unable to provide. * * * The legislative history of the 1962 amendments of the Act indicates that the supplementals are not 'second class,' but that they are to provide

25/ While TWA apparently perceives something improper in the term "bulk transportation market," the term means nothing more than the market for group transportation. Supplemental carriers are permitted to tap the market through charter services which maintain the requisite distinction between group and individually ticketed travel.

> the public with 'convenient and adequate air transportation' and 'achieve a permanent and stable place in our air transportation system.' Sen. Rept. No. 688, 87th Cong. 2d Sess. (1961), 1 U.S. Code Cong. and Adm. News 1844, 1855, 1851 (1962).
>
> "Courts as well as the Board have recognized that the Act contemplates competition between supplemental and scheduled airlines. In National Air Carrier Association v. C.A.B., 442 F.2d 862 (D.C. Cir., 1971), for example, the court declared that 'the existence of a market structure conducive to maximum feasible competition' between scheduled and supplemental carriers 'is the highest and best definition of both our national and consumer interest in the conditions under which international air transportation is to be carried on.' Cf. National Air Carrier Association v. C.A.B., 436 F.2d 185, 194, 197 (D.C. Cir., 1970).
>
> "The Board, as the agency charged with administering the Act, has ruled that the scheduled carriers' view of the supplementals' role is erroneous. In the Transatlantic Supplemental Charter Authority Renewal Case, CCH Aviation Law Rep. Para. 22, 067.01, p. 14, 116 (1972) the Board found that contentions of TWA and Pan American, similar to those made here, were 'fundamentally inconsistent with our outlook on the relationship between charter and scheduled carriers.' It stated: 'Our approach recognizes that both scheduled and charter services are integral elements of international air transportation fulfilling a legitimate and vital role, and that scheduled carriers and supplementals each have a right to compete for transatlantic bulk traffic.'" Pan American, supra, 517 F.2d at 744.

Moreover, the perceived right of both supplemental and scheduled carriers to compete in the bulk transportation market accords with the announced policy of the United States, as reflected in the "Statement of

International Air Transportation Policy," approved by the President on June 22, 1970 (App. B, infra), a statement which this Court and others have recognized as bearing on the correctness of Board decisions involving relationships between the supplemental and scheduled air carriers. See, e.g., Pan American v. C.A.B., supra, 517 F.2d at 744; National Air Carrier Association v. C.A.B., 442 F.2d 862 (C.A.D.C., 1971). The statement notes with respect to the "bulk transportation market":

> "Both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market. We consider passengers traveling at group rates on scheduled services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the Government should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers."

Thus, the fact that there will be competition between scheduled and supplemental carriers for passengers interested in bulk transportation does not make OTC's "non-supplemental," any more than the existing competition for bulk transportation renders the supplementals' TGC's, ITC's or other charter services illegal.

Furthermore, the Board quite properly concluded that OTC operations would not cause any significant diversion of traffic from the scheduled

services. 26/ As adopted, the rule contains an elaborate set of restrictions that will have the practical effect of precluding the use of OTC's by the kind of traveler upon whom scheduled service most depends and for whom scheduled air service is so important--persons who want or need the ability to make travel plans late and to change travel plans readily. As the Board noted

> "[t]he practical effect of the restrictions that are a part of the OTC rule will be to require travel plans to be made considerably in advance, to preclude the use of OTC's by passengers who for any reason cannot be certain of their vacation plans, and to preclude the use of OTC's by persons who cannot accommodate themselves to the decision of OTC operators in respect to departure date, length of stay, and return date." SPR-85, p. 6, A.6a.

That the diversionary impact would be minimal was further evidenced, as the Board noted, by such factors as the lack of capacity available to the supplemental carriers to carry substantial OTC traffic, the bars and limitations on the performance of inclusive tours imposed by several foreign governments, the views of several scheduled carriers that the OTC rule would not adversely affect their own scheduled operations, and the fact that past

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26/ It should be noted that TWA does not attempt to show that the OTC rule would result in the diversion of significant traffic from scheduled services.

increases in charter operations have not impaired the growth of scheduled services (SPR-85, pp. 5-6, A.5a-6a).[27/]

In light of this, there is no basis for the contention regarding the "supplemental" character of the Board's OTC rule. The policies of the Act clearly support the view that the requirements of Section 101(34) of the Act that the charter services "supplement scheduled service" permits the Board to authorize charter services which it finds are a valuable adjunct to the overall system. That OTC's fill this bill is just as clear. Charter service is inherently less expensive than scheduled because of the economies of planeload operations. Equally clear is that public demand for the less expensive service which these economies make possible is inexorable. The OTC charter concept provides a sound and proper avenue for individuals who are not members of "affinity" groups or organizations to obtain the benefits offered by charter transportation.

Moreover, it should be emphasized that all carriers, including TWA, can derive substantial benefits from OTC operations. The new form of charter has the potential to generate substantial traffic from potential travelers for whom conventional scheduled service is prohibitively ex-

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27/ Moreover, all risk of significant diversion has been eliminated by the manner in which the Board adopted the experimental rule. Thus, in the unlikely event that OTC's should begin to threaten scheduled service in some markets or the health of some segment of the scheduled air carrier industry, the Board emphasized that it would impose limitations on the number of OTC's that may be operated in specific markets, or, if necessary, terminate the OTC experiment outright.

pensive, and with such traffic generation would undoubtedly come additional revenues and improved utilization of existing aircraft for all carriers.[28/] Thus, the OTC charters would ultimately benefit the public and scheduled and supplemental carriers alike. As the District of Columbia Circuit noted in the Saturn case:

> "[T]he consistent lamentations and predictions of doom raised by the scheduled air carriers in the past have proved, to our way of thinking, to be considerably overstated. The actions of the Board in this area have provided for steady growth in both the scheduled and supplemental markets, and the public, as it should be, has been the primary benefactor." (483 F.2d at 1291-92).

CONCLUSION

The basic scheme of the OTC rules provides for a number of restrictive conditions. Taken together, they maintain the required distinction between charter services and that of the regularly scheduled airlines.

As this Court stated in Pan American, "[b]ecause of the demand by the traveling public and the sizeable economic benefits of tourism * * *, courts should take care that their powers of review are not used to discourage

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28/ This accounts for the fact that United Air Lines and other major scheduled carriers support the OTC rules. As noted supra, note 10a, the U.S. scheduled carriers, including TWA, are presently heavily involved in OTC operations and account for 62 percent of the OTC's filed with the Board through the end of 1975.

experimentation in new charter concepts." 517 F.2d at 745. The OTC rule represents a valuable and needed experiment. It accords with the applicable statutory provisions and congressional policy and should therefore be affirmed.

Respectfully submitted,

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January 29, 1976

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 et seq.:

TITLE I -- GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1301]. As used in this Act, unless the context otherwise requires -

* * * * *

(33) "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

(34) "Supplemental air transportation" means charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act. Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to member of the general public, or to do so indirectly by controlling, being controlled by, or under common control with a person authorized by the Board to make such sales.

* * * * *

TITLE IV -- AIR CARRIER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. [72 Stat. 754, as amended by 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1371]. (A) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

Issuance of Certificate

(d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

* * * * *

(e)(6) Any air carrier, other than a supplemental air carrier, may perform charter trips (including inclusive tour charter trips) or any other special service, without regard to the points named in its certificate or the type of service provided therein, under regulations prescribed by the Board.

* * * * *

APPENDIX B

B-1

THE WHITE HOUSE

Washington

June 22, 1970

MEMORANDUM FOR:

THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE ATTORNEY GENERAL
THE CHAIRMAN, CIVIL AERONAUTICS BOARD

I have approved the attached Statement of International Air Transportation Policy, which was prepared by the Interagency Steering Committee established in August of 1969 and which I forward as policy guidance for the execution of your responsibilities in the area of international air transportation.

/S/

Richard Nixon

STATEMENT OF INTERNATIONAL AIR TRANSPORTATION POLICY

Public policies operate in a steadily changing technical, economic, and social environment. For sustained progress toward broad national goals we must reexamine our policies regularly to assure that relevant changes are taken into account. This is especially important in fields like international air transportation, where changes are rapid.

United States policies with regard to international air transportation were last given comprehensive review in 1962-63, as high capacity jet aircraft were coming into service. In the meantime, international aviation has expanded greatly. This dramatic growth has generated new policy questions and changed the dimensions of others. Renewed attention must now be paid to such problems as airway and terminal congestion, the liability of carriers for passengers and cargo, and the cost burden of the facilities needed for safe international flight. Our policies with regard to competition need reappraisal in the light of the substantially expanded market for international services, and its projected further growth. This market has now warranted certification of two United States round-the-world carriers. It has sustained the recent strong traffic growth of the United States supplemental airlines. It is the type of market which attracted an unprecedented eighteen United States carrier applications for route awards in the Transpacific case. At the same time, it is a market in which prospects of excess capacity or other dislocations are seen from various quarters, and these concerns are made the more acute by the appearance of the wide-bodied jets and anticipation of supersonic aircraft.

The present review of United States international air transportation policy is an effort to take account of current conditions, and the prospective circumstances of the 1970's, in a way which best serves our fundamental interests in international air transport. These interests, as expressed in the Department of Transportation Act of 1966 and the Federal Aviation Act of 1958, are (1) to promote international air transportation that is "fast, safe, efficient and convenient ... at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the nation's resources" and (2) to encourage and develop "an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service, and of the national defense."

Clearly, such a policy must seek to achieve a number of objectives and take into account a number of constraints. It must aim to develop and maintain a sound system of international air transportation that carries people and goods safely, efficiently, and economically. It should promote an expanding, innovative, economically and technologically

efficient international air transport system which (1) provides that passengers and shippers share in the benefits through improved service and reduced fares and (2) assures U.S. air carriers a fair and equal opportunity to compete in world aviation markets so as to maintain and further develop an economically viable service network wherever substantial need for air transportation appears.

These purposes cannot be realized until aircraft hijackings are stopped. By any standard, air piracy is reprehensible. We support measures designed to end this terrible practice.

Our international air transportation policy must recognize a number of other U.S. objectives or principles; these may at times be served by the policy or at times be constraints upon it. Thus, the policy must be appropriately mindful of U.S. strategic and political interests, the international military air transportation interests of the U.S., and the prospective effect of the policy on the U.S. balance of payments. It must take into account legitimate air transport interests of other countries and recognize that in the final analysis the policy cannot be viable without international acceptance. It should recognize that the United States historically has believed that the economic and technological benefits we seek can best be achieved by encouraging competition (the extent of competition to be determined on a case-by-case basis) and by a relative freedom from governmental restrictions. The policy must also reflect our concern about the quality of the environment, and our determination that adequate efforts are made to preserve and enhance that quality as we continue to develop the technology of air transportation.

Proceeding from the premises set out above, our review has led us to the following conclusions with regard to the central aspects of this nation's international air transportation policy.

1. The Exchange of Air Transport Rights

* * * * *

2. Charter Operations and the Role of Supplemental Carriers in Relation to Scheduled Services

Since 1963 international charter services by scheduled and supplemental carriers have grown in importance, have been increasingly accepted by the public, and now form an integral part of some markets. While the roles of scheduled and supplemental carriers are different as described in this Statement,

there has nonetheless developed in certain areas competition between them. This may, indeed, increase.

We expect both scheduled services (individually ticketed and individually waybilled) and charter services (whether offered by supplemental carriers or scheduled carriers) to have important roles throughout the coming decade. The growth rates of both services make it appear likely that both will have substantial markets.

Scheduled services are of vital importance to air transportation and offer services to the public which are not provided by charter services. Only scheduled services are expected to offer regular and dependably frequent schedules, provide extensive flexibility in length of stay, and maintain worldwide routes, including routes to areas of low traffic volume. Substantial impairment of scheduled services could result in travelers and shippers losing the ability to obtain these benefits. Accordingly, in any instances where a substantial impairment of scheduled services appears likely, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment.

Charter services by scheduled and supplemental carriers have been useful in holding down fare and rate levels and expanding passenger and cargo markets. They offer opportunities to exploit the inherent efficiency of planeload movement and the elasticity of demand for international air transport. They can provide low-cost transportation of a sort fitted to the needs of a significant portion of the traveling public. Charter services are a most valuable component of the international air transportation system, and they should be encouraged. If it appears that there is likely to be a substantial impairment of charter services, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment.

Additional uniformity and simplification of charter rules is desirable, and an effective charter enforcement program should be maintained.

Both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market. We consider passengers traveling at group rates on scheduled services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the Government should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers.

Licensing tools (geographic limitations, charter definitions, volume restrictions, etc.) can be utilized to adjust the competition between scheduled services and charter services. However, the widespread public acceptance of charters warrants care in taking any restrictive actions. A determination whether to impose restrictions upon charter services should consider principally the extent to which the ability to obtain frequent and regular travel would otherwise be prejudiced. If it is necessary to restrict charter services because it is found that only scheduled service can provide the required convenience, and it is the charter services that make impossible the maintenance of the scheduled service, the restrictions should be the minimum necessary to have the required effect.

The foreign landing rights for charter services should be regularized, as free as possible from substantial restriction. To accomplish this, intergovernmental agreements covering the operation of charter services should be vigorously sought, distinct, however, from agreements covering scheduled services. In general, there should be no trade-off as between scheduled service rights and charter service rights. In negotiating charter agreements, the continuation of and the nature of the charter rights of foreign carriers will be at issue.

3. Rates and Fares and the Role of the International Air Transport Association (IATA)

Under existing United States policy the Civil Aeronautics Board has permitted U.S. carrier participation in IATA subject to various conditions and disciplines. Within that framework the Board has encouraged pricing policies, including experimentation with promotional fares, which would make air services available on the lowest economic basis to the widest possible market. To this end, the Board has also encouraged aggressive and free competition in charter pricing by the supplemental carriers.

This approach has been successful in the past five years in bringing about substantial improvement in the level and structure of North Atlantic fares, and traffic growth has been rapid. However, IATA has not made similar progress on North/Central Pacific routes, where normal fares remain well above justifiable levels and there are no individual economy class excursion fares or certain other promotional fares comparable to those in effect across the North Atlantic. The Board is handicapped by its lack of authority to regulate international rates, authority which other governments assert.

The U.S. should work for the broadest range of potentially profitable services designed to appeal to the broadest consumer market and based on the lowest cost of operating an efficient air transport system.

Innovative experimentation with promotional fares and varying service concepts should be encouraged to take full advantage of technological developments.

The U.S. should continue to accept IATA as the machinery for pricing scheduled services, subject to continuing safeguards, but supplemented by increased direct informal exchanges between governments. Continued support should also be given to the establishment of IATA and non-IATA charter rates on a free competitive basis. The effectiveness of the Board in its dealings both with IATA and governments should be enhanced by vesting it with authority to regulate rates and fares between the U.S. and foreign points, subject to Executive review. 1/

4. Competition Among and Between U.S. Carriers and Foreign Carriers

Competition among air carriers, as in other areas of economic activity, tends to improve the quality and variety of service to the public, keeps prices reasonable, and enlarges the market for all carriers. The concept of a single carrier or chosen instrument for the United States remains as undesirable today and in the future as in the past.

The United States should maintain a flexible policy on certificating competition among U.S. carriers on international routes. This policy should take into account the public's need for additional or improved air services, including new direct services, including new direct services from U.S. points other than major gateways and improved service to points abroad where this is necessary to meet the challenge of changing market patterns. At the same time, our policy on competition must take account of the economic viability of the additional or improved air services, including a consideration of the probable foreign carrier competition and the new factors of charter competition and wide-bodied jets. The policy should also distinguish between point to point competition of U.S. carriers and services to a particular

1/ Since 1966, the CAB has favored Executive notification rather than Executive review.

foreign country from different sections of the U.S. Within this framework, there may be future route possibilities for new U.S. carriers, as well as incumbent carriers.

Every effort should be made to improve U.S. carrier competitive performance vis-a-vis foreign flag carriers in some markets, particularly the North Atlantic. Continuing to improve the quantity and variety of services in such markets would enhance our competitive standing. U.S. carriers should adequately serve the international routes for which they are certificated. All appropriate U.S. Government agencies should cooperate with the CAB in developing criteria and procedures to assure that the public convenience and necessity is served. The result should be improved U.S.-flag service and a general increase in economic efficiency which in the final analysis could be translated into lower costs to the public and should result in an improvement in the United States carriers' competitive standing in international air transportation markets.

Generally, economic cooperative arrangements such as revenue or traffic pools between U.S. and foreign air carriers are anti-competitive and as a rule should continue to be discouraged. The United States should continue its flexible policy with respect to other forms of economic cooperative arrangements, such as blocked-space agreements, when these are shown to be in the public interest, improve the air service network, and otherwise meet U.S. international aviation policy objectives.

The United States recognizes that significant benefits to the public can and do result from competition by foreign air carriers. It is important, however, to assure that this competition is fair, non-discriminatory, and in keeping with the provisions of our air transport agreements. There is some evidence that the incidence of air services by foreign air carriers from points behind their home countries may continue to increase. This situation should be kept under review and appropriate consultative and other steps taken as necessary.

5. <u>All-cargo Certification and Rights</u>

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6. <u>Carrier Liability</u>

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7. Insurance

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8. Facilitation

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9. User Charges, Fees and Taxes

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10. Balance of Payments

U.S. policy on international air transportation, as in numerous other areas, must give especially close attention and careful consideration during the 1970's to potential effects on the balance of payments.

This will require, first and foremost, an active and on-going balance-of-payments consciousness on the part of all agencies concerned.

A second major requirement is that it must reflect a balanced and comprehensive assessment of potential policy effects on the three major payments accounts which are directly affected by international air transport activities--air transportation, overseas travel, and aircraft exports--as well as the effects of air cargo policies on the foreign trade account generally. In carrying out such assessment, the most important point to be kept in mind is that by far the largest part of the possible effects of air transport policies on all three of these accounts must be expected to relate to, and result directly from, their expected influence on the general growth rate of total international passenger traffic and/or the relative numbers of American, as compared with foreign, travelers making up this total traffic.

Taking account of these balance-of-payments considerations while, at the same time, recognizing the importance of encouraging economically sound growth of air transport activities as a basic objective of U.S. aviation policy, the following further guidelines are also recommended.

U.S. air transport policy during the 1970's should recognize that actions which improve the U.S. flag share of international air traffic also provide some benefit to the U.S. payments.

It should also make a continuing effort (in conjunction with, and support of, other Government and private-sector efforts on this subject) to give some extra stimulus to a faster growth of inbound, relative to outbound, travel by: maintaining a margin of necessary flexibility for, and giving sympathetic and imaginative consideration to various possible means of providing limited directional encouragements. This is especially desirable when incremental costs are lower in a given direction.

APPENDIX C

CARRIER BREAKDOWN ON THE NUMBER
OF OTC FLIGHTS FILED WITH THE BOARD
FROM SEPTEMBER 15 THROUGH DECEMBER 31, 1975

U.S. SCHEDULED CARRIERS

Carrier	No. of Flights
United	1045
American	841
TWA	705
Pan American	520
Northwest	158
North Central	150
Airwest	132
Continental	90
Braniff	61
Ozark	52
Allegheny	24
Western	14
Frontier	12
Southern	4
Piedmont	2
Texas International	2
	3,812 (62%)

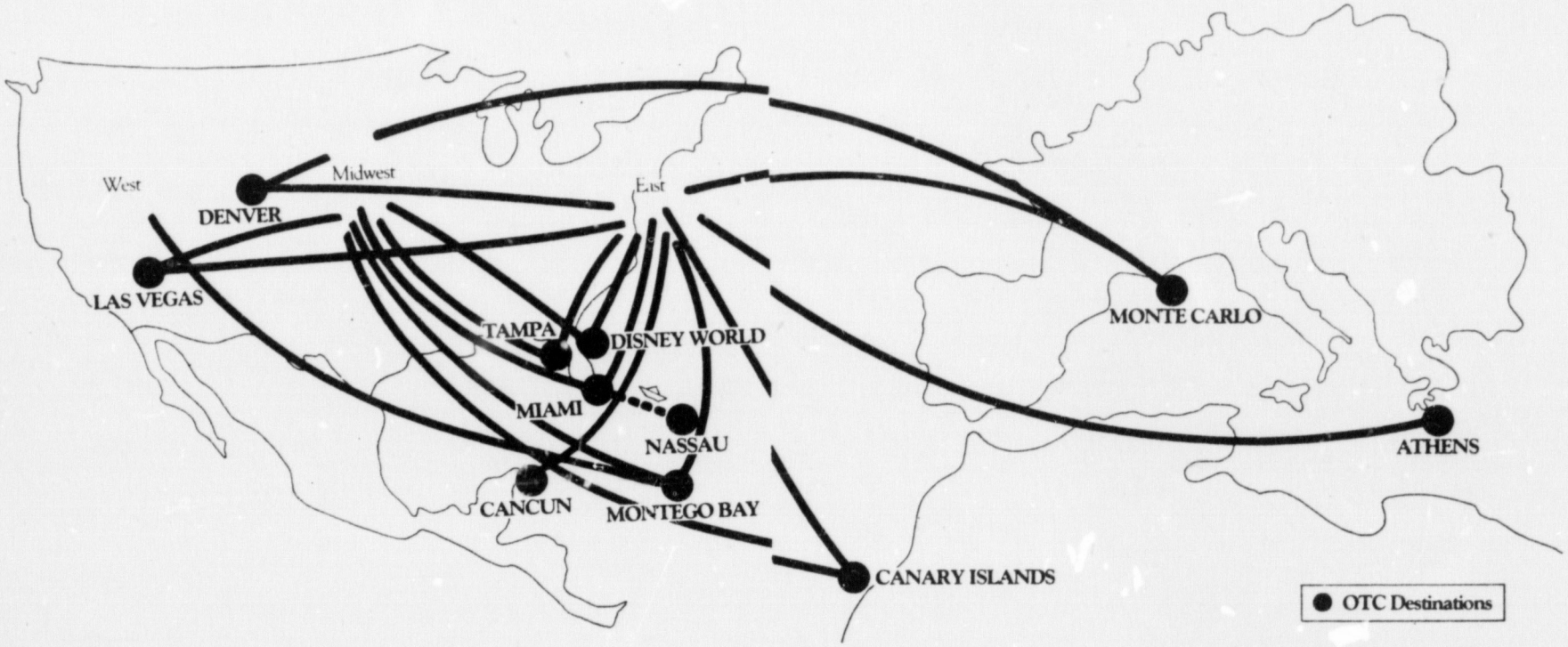
SUPPLEMENTAL CARRIERS

Carrier	No. of Flights
Overseas National Airways	711
Trans International Airlines	392
World	297
Capital	258
McCulloch	138
Johnson	4
	1,800 (29%)

FOREIGN CARRIERS

Carrier	No. of Flights
Dan Air	122
Avianca	116
British Caladonian	83
Aerovias de Mexico	72
British Airways	67
Iberia	50
KLM	30
Spantax, S.A.	18
Swissair	8
Lanica	1
Aerlinte	1
TAP	1
	569 (9%)
TOTAL--All Carriers	6,181 (100%)

TWA ANNOUNCES A SALE ON THE WORLD.
We're flying OTCs to all these destinations.



Your OTC customers never had it so good. Now you can give them a name they can trust to the destinations they want.

TWA is flying competitively priced OTCs to many of the most popular vacation spots in the United States, Europe, Mexico and the Caribbean. As shown on the map above, our OTC flights leave regularly from East, Midwest and West Coast cities. What's more, departures are on the days of the week most in demand.

As you might expect, these are not just any old OTC flights. They're OTC flights TWA style.

They'll be served by experienced TWA flight crews, the same crews that operate TWA scheduled flights. And they'll give your customers comfortable seating, quality food and beverages, even in-flight entertainment on most long-haul flights.

Can any non-scheduled carrier compete with this? Not in our book.

For more information on our OTC programs, call TWA Reservations or ask our sales rep for our "Trans World Char Program and Information Guide," and watch for trade ads of the operators running our OTC programs.

TWA has put the world on sale starting right now. We hope you sell a piece of it.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,	:	
Petitioner,	:	
v.	:	No. 75-4169
CIVIL AERONAUTICS BOARD,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served respondent's printed brief by mailing copies thereof to the following:

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February 5, 1976